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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

ROBERT LEE BACOTE,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

On Writ Of Certiorari
To The Supreme Court of
South Carolina

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Whether The State, In A Prosecution For Driving Under The Influence Is Estopped From Presenting Evidence Of And/Or Re-Litigating A Defendant's Refusal To Submit To A Chemical Breath Test When The Defendant's Administrative Driver's License Suspension Has Been Reversed Through The Administrative Appeals Process?

List Of Parties To The Proceeding In the Court Below:

The parties in the Proceedings in the Court below are Appellant/Petitioner Robert Lee Bacoteeves and Appellee-Assistant Solicitor Brent Alan Gray, of Moncks Corner for The State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Lee Bacote, respectfully prays a Writ of Certiorari issue to review the judgment of the South Carolina Supreme Court entered on June 1, 1998, and on the subsequent September 10, 1998, denial of his Petition for Rehearing.

OPINIONS BELOW

The General Sessions Court of the Ninth Judicial Circuit, Charleston, South Carolina granted the Petitioner's Motion to Suppress the State's evidence of the Petitioner's refusal to submit to a chemical breath test. The Trial Court entered a written order. (App.1-2). The State took an immediate appeal. The South Carolina Court of Appeals issued an unpublished opinion on February 6, 1997, reversing the Trial Judge and concluding the State was able to present evidence of the Petitioner's refusal. (App.4). The Petitioner filed a Petition for Rehearing which was denied on March 19, 1997. (App.11). The Petitioner's later Petition for Writ of Certiorari to the South Carolina Supreme Court was granted on December 5, 1997. (App.13). On June 1, 1998, the South

Carolina Supreme Court affirmed the Court of Appeals (App.14) and, on September 10, 1998, denied the Petitioner a rehearing. (App.22).

JURISDICTION

Judgment of the South Carolina Supreme Court was entered on June 1, 1998, and the rehearing petition was denied on September 10, 1998. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. Section 1257(a).

STATUTORY PROVISIONS

(a) S.C. Code Ann. § 56-5-2950(a) (West Group 1997):

> A person who operates a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs if arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle while under the influence of alcohol . . . .

(b) S.C. Code Ann. § 56-5-2950(d) (West Group 1997):

> If a person under arrest refuses, upon the request of a law enforcement officer, to submit to chemical tests . . ., none may be given, but the department, on the basis of a[n] [officer's] report . . . the arrested person was operating a motor vehicle . . . while under the influence of alcohol . . . the person had refused to submit to the tests shall suspend his license . . . for a period of [90] days . . . .

(c) S.C. Code Ann. § 56-5-2950(e) (West Group 1997)

> Upon suspending the license . . ., the department shall notify immediately the person in writing and, upon his request, shall afford him an opportunity for a hearing in accordance with the State Administrative Procedures Act, except . . . the scope of the hearing for the purposes of this section must be limited to the issues of whether the person was placed under arrest, whether the person had been informed . . . he did not have to take the test but . . . his privilege to drive would be suspended or denied if he refused to submit to

the test, and whether he refused to submit to the test upon request of the officer. The department shall order . . . the suspension or determination . . . there should be a denial of issuance either be rescinded or sustained.

STATEMENT OF THE CASE

a. The Pre-Arrest Activities

On June 26, 1994, Petitioner Bacote was driving his Lincoln on Murray Boulevard in Hanahan, South Carolina. He had just left the area of the Broadmore Apartments when an unidentified person apparently contacted the Hanahan Police Department and requested that law enforcement monitor Mr. Bacote's movements, because he was possibly intoxicated. A Hanahan police officer was dispatched to the area and, thereafter, began following Petitioner Bacote while he was driving on Murray Boulevard. The Officer followed Petitioner Bacote and, after allegedly observing him twice cross the roadway center line, stopped Petitioner Bacote for suspicion of DUI. The Officer admitted, however, that while there was on-coming traffic in the area, Petitioner Bacote did not cause an accident nor did he run off of the road.

b. The Interrogation

After effecting the traffic stop, the Officer detained Petitioner Bacote on the roadside. The Officer freely admitted, when he detained Petitioner Bacote, he (the Officer) was most assuredly (a) investigating Petitioner Bacote's suspected criminal activity, (b) Petitioner Bacote was under his official police authority, and (c) Petitioner Bacote would not have been able to leave the scene of the traffic stop if he had attempted to do so. In addition, the Officer admitted he did not advise Petitioner Bacote of his constitutional rights against self-incrimination either before or after he arrested

Petitioner Bacote.

Notwithstanding this constitutional infirmity, the Officer administered three (3) field sobriety tests to Petitioner Bacote -- namely reciting the ABCs, the single-leg balance (right and left legs), and the ten-step heel to toe walk. The Officer stated he had sufficient probable cause to arrest Petitioner Bacote for DUI after the second field sobriety test, but gave him the third test because he "always g[a]ve three tests."

Unabashedly, the Officer also admitted he intended to use, at a later criminal trial, whatever statements, movements, and other information he obtained from Petitioner Bacote during the traffic stop, even though there had been no Miranda warnings.

c. The BA Test And Refusal

After Petitioner Bacote allegedly failed the field sobriety tests, the Officer arrested him for DUI. Petitioner Bacote was transported to the Charleston County Detention Center for administration of a chemical breath test. Petitioner Bacote refused to submit to the chemical breath test.

d. The Administrative Finding

Prior to the "trial" Petitioner Bacote requested the South Carolina Department of Public Safety to conduct a hearing to review his test refusal. As a result of this request, Petitioner Bacote appeared before a hearing officer for an administrative hearing. Due to other trial conflicts, the administrative hearing was twice cancelled and rescheduled. The Officer appeared at the first two cancelled hearings, but

did not appear for the re-scheduled hearing. The chemical breath test operator appeared at each of the hearings. Prior to each scheduled hearing the SCDPS sent out a notification letter regarding the date of the administrative hearing. Copies of this correspondence were sent to the Officer's department.

On December 12, 1994, the third occasion, the SCDPS conducted a hearing and the hearing officer "recommend[ed] . . . the suspension of [Petitioner Bacote's] driver's license . . . for refusing to submit to a chemical test of his breath be rescinded." This recommendation was approved by the administrative hearings supervisor.

e. Trial Judge's Evidentiary Ruling

During a pre-trial discussions, the State said it was going to introduce evidence of Petitioner Bacote's test refusal. The Trial Judge then announced he would take up the admissibility of Petitioner Bacote's test refusal. While no pre-trail motion had been made, the Trial Judge required Petitioner Bacote to so move before the jury was sworn.[1] After hearing from the Officer, the Trial Judge determined the refusal "evidence [had to] be suppressed due to the administrative dismissal [of Petitioner Bacote's driver's license suspension for refusing to take the test]." The Trial Judge further stated, since neither the Supreme Court nor the South Carolina Court of Appeals had ruled on this issue, he

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[1]This took place after the jury was selected, but prior to being sworn. The Trial Judge had, however, excused them from the courtroom.

would look to "other [similar] rulings in the [C]ircuit [C]ourt" such as the decision of the Honorable Walter J. Bristow, rendered on March 25, 1993, in State v. Andrew M. Smith.

In Smith, Judge Bristow

> remanded a DUI conviction for a new trial, finding . . . it was reversible [sic] error for a trial judge to allow the State to present proof of a statutory element o[f] a criminal case, as to the Defendant's refusal to take a breathalyzer test, when the State had failed to satisfy the [statutory] elements [in] the administrative hearing, involving the same parties . . . .

The State indicated it was going to immediately appeal and then declined to move forward with its case against Petitioner Bacote. This appeal followed.

REASONS FOR GRANTING THE WRIT

REVERSAL OF AN ADMINISTRATIVE DRIVERS' LICENSE SUSPENSION COLLATERALLY ESTOPPES THE STATE FROM RELITIGATING THE "BA REFUSAL" DURING A LATER DUI CRIMINAL PROSECUTION

While the operator of a motor vehicle in South Carolina impliedly grants his consent to submit to a chemical breath test if he has been arrested for DUI, S.C. Code Ann. § 56-5-2950(a) (West Group Supp. 1997); City of Columbia v. Moore, 318 S.C. 292, 296, 457 S.E.2d 346, 348 (Ct.App. 1995); the law does not require such an individual to actually take the test. S.C. Code Ann. § 56-5-2950(d) (West Group Supp. 1997). Nevertheless, such a refusal results in an automatic administrative suspension of his driver's license. S.C. Code Ann. § 56-5-2950(d). An "implied consent" suspension remains effective regardless of the outcome of any DUI criminal prosecution.

A driver whose license has been automatically suspended may request the SCDPS to conduct an administrative review hearing to address whether the suspension was legally imposed. S.C. Code Ann. § 56-5-2950(e) (West Group Supp. 1997). The administrative hearing process either rescinds or affirms the suspension. S.C. Code Ann. § 56-5-2950(e).

Petitioner Bacote refused to take the test and his driver's license was administratively suspended. He requested an administrative hearing and the "the suspension . . . [was] rescinded." During the DUI trial, the State sought to present evidence of the refusal despite the prior SCDPS administrative dismissal. Petitioner Bacote successfully moved to suppress.

A. *Implied Consent For Chemical Breath Test Submission*

It cannot be disputed an operator of a motor vehicle in South Carolina impliedly grants his consent to submit to a chemical breath test if he has been arrested for DUI. S.C. Code Ann. § 56-5-2950(a) (West Group Supp. 1996); City of Columbia v. Moore, 318 S.C. 292, 296, 457 S.E.2d 346, 348 (Ct.App. 1995). Nevertheless, the law does not require such an individual to actually take the BA test, S.C. Code Ann. § 56-5-2950(d) (West Group Supp. 1997), but such a chemical breath test refusal will result in the SCDPS automatically administratively suspending the operator's driver's license for 90 days. S.C. Code Ann. § 56-5-2950(d).[2]

A driver whose license has been automatically suspended may request the SCDPS to conduct an administrative review hearing to address whether the suspension was legally imposed. Bacote, ___ S.C. ___, ___ S.E.2d ___ (1998) (1998 WL 282851 *2) (citing S.C. Code

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[2]An "implied consent" suspension remains effective regardless of the outcome of any DUI criminal prosecution.

Ann. § 56-5-2950(e) (Law. Co-op. 1991)). The SCDPS administrative hearing process either rescinds or affirms the suspension. S.C. Code Ann. § 56-5-2950(e).

Petitioner Bacote refused to take a chemical breath test and his driver's license was administratively suspended. He requested an administrative hearing and ultimately the "the [administrative] suspension . . . [was] rescinded." During the DUI trial, the State wanted to present evidence of the refusal despite the prior administrative dismissal. Petitioner Bacote successfully moved to suppress.

The South Carolina Supreme Court determined *collateral estoppel* did not apply to a SCDPS administrative hearing under S.C. Code Ann. § 56-5-2950(e). See Bacote, ___ S.C. ___, ___, ___ S.E.2d ___, ___ (1998 WL 282851 * 4-5). The Supreme Court affirmed the Court of Appeals' reversal of the Trial Judge and permitted introduction of the evidence.

B. *Doctrine Of Collateral Estoppel Applicable To A SCDPS Administrative Suspension Hearing*

The Supreme Court stated "[u]nder the doctrine of *collateral estoppel*, when an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim." Carmen v. South Carolina Alcoholic Beverage Control Commission,

317 S.C. 1, 7, 451 S.E.2d 383, 386 (1994) (Emphasis added). Moreover, the doctrine of *collateral estoppel* applies in situations where "an administrative agency is acting in a judicial capacity . . . ." Carmen, 317 S.C. 1, 7, 451 S.E.2d 383, 386.

In Bacote, the Supreme Court noted, in addition to the above, South Carolina *collateral estoppel* law also involved portions of the *Restatement (Second) of Judgments*. In South Carolina Property and Casualty Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991), the Supreme Court adopted Section 28 of the *Restatement (Second) of Judgments* (1982) which "provid[ed], in pertinent part:

> [Under some circumstances], relitigation of the issue in a subsequent action between the parties is not precluded [when]:
>
> * * *
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them . . . .
>
> * * *

(4) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."

Bacote, ___ S.C. ___, ___, ___S.E.2d ___, ___ (1998 WL 282851 *5-6) (quoting *Restatement (Second) of Judgments*, § 28). Under the Section 28 rationale, the Supreme Court determined "the summary nature of a typical license revocation hearing makes determinations from such a hearing inappropriate for the application of *collateral estoppel*." Bacote, ___ S.C. ___, ___, ___S.E.2d ___, ___ (1998 WL 282851 *6) (citing People v. Moore, 138 Ill.2d 162, 561 N.E.2d 648 (1990)).

While this "summary nature" may be true for some of the SCDPS hearings, it clearly is not a universal position as demonstrated by this very case. The Supreme Court should have permitted the application of *collateral estoppel* on a

case-by-case basis depending on the involved nature of the particular SCDPS hearing and, in addition, especially if the suspended driver is able to reverse the suspension. Such *collateral estoppel* effect is particularly important when a DUI defendant succeeds at the administrative level in having the suspension overturned since, without *collateral estoppel*, the State is still permitted to use this evidence of a driver's "refusal" even though the suspension was improperly applied. Currently, the State has the "best of both worlds" since, regardless of the SCDPS hearing outcome, the State still has the "refusal" as ammunition in the DUI prosecution regardless of the validity of the suspension.

The State admitted, during the SCDPS administrative hearing, "[b]oth parties, the State and the accused, are entitled to a full hearing as to the introduction of evidence." (Emphasis added). The State concedes the value of a test refusal hearing and its inherent importance in the judicial process. Under S.C. Code Ann. § 56-5-2950(e), "the State ha[d] the burden of proof [to demonstrate Petitioner's DUI] . . . ." The State sought to introduce evidence of Petitioner Bacote's test refusal to demonstrate he "knew" he was intoxicated at the time he was driving. The State could then argue Petitioner Bacote refused the test, notwithstanding the suspension, to deny the officer evidence for use in a later DUI prosecution - regardless of the SCDPS's decision.

Just as important, even though a suspension hearing may not have been designed as a pre-trial evidentiary hearing, such hearings oftentimes afford a defendant his principle

opportunity to discover evidence from the State. This is especially true in a DUI - First Offense case, since there is no preliminary hearing for such a charge.

Notwithstanding, the sometimes limited nature of administrative hearings like the Employment Security Commission proceedings in Shelton v. Oscar Meyer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997); test refusal hearings are more than simple administrative procedures limited to the appropriateness of the ninety-day suspension. These hearings are very important since the arresting officer and the test operator must testify, under oath, to demonstrate the DUI arrest was proper and the test procedures were followed.

Moreover, unlike an ESC hearing where "the matter in controversy is . . . small [and the parties] are generally likely to be unrepresented by counsel," Shelton, 319 S.C. 81, 89, 459 S.E.2d 851, 855, a refusal hearing has many issues in controversy and the defendant is most likely will, in fact, be represented by counsel. For example, the relative certainty of substantially higher insurance rates[3] and/or not being able to operate a motor vehicle constitutes a substantial hardship justifying retaining legal counsel to challenge the

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[3]In order to operate a motor vehicle after a DUI conviction, the convicted driver must obtain special insurance, commonly referred to as SR-22. Current estimates of SR-22 insurance rates often exceed $3,200.00 per year for the required three years.

administrative suspension.

Additionally, there is no guarantee the SCDPS will schedule or conduct the administrative hearing in an expedient manner. For example, Petitioner Bacote's hearing occurred more than five months after his arrest and the hearing officer rendered the decision two months later.[4] Moreover, operators subject to an administrative suspension do not have any incentive to have a "speedy" hearing, since when a refusal hearing is requested, the drivers' license suspension does not even begin unless and until after the suspension is affirmed. S.C. Code Ann. § 56-5-2950(d). Petitioner Bacote, therefore, does not have any pressing need to have the matter proceed expeditiously. Therefore, unlike the unemployment benefits situation in Shelton where funds may be necessary for food and shelter, there are no exigent circumstances present in a administrative refusal hearing.

Finally, the reason the suspension has been overturned does not provide any reason to deny a defendant the benefit of a reversal. For example, in Village of Westfield v. Mashek, 189 Wis.2d 491, 527 N.W.2d 399 (Ct.App. 1994) (1994 Wisc.App. LEXIS 1392); the State, as in this case, failed to appear at the judicial review and the administrative suspension was vacated. Mashek, 1994 Wisc.App. LEXIS

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[4]Contrast such a situation with an unemployed worker seeking unemployment benefits and having to wait more than five months for a hearing and then two additional months for a decision. See Shelton, 319 S.C. 81, 459 S.E.2d 851.

1392 *3. Mr. Mashek unsuccessfully moved to suppress any evidence of probable cause, Mashek, 1994 Wisc.App. LEXIS 1392 *3-4; but was tried and convicted. Mashek, 1994 Wisc.App. LEXIS 1392 *3-4. On appeal the Wisconsin Court of Appeals reversed the trial court holding

> The [State] knew or should have known . . . the issue of probable cause to arrest was to be reviewed at the judicial review, and no valid reason was given [to the court] why the [State] failed to appear. . . . Thus, the [State] has only itself to blame for not appearing at the judicial review. This is not a circumstance in which the application of the doctrine of collateral estoppel is inappropriate.

Mashek, 1994 Wisc.App. LEXIS 1392 *6-7 (citing Heggy v. Gardner, 156 Wis.2d 186, 193-194, 456 N.W.2d 845, 849 (Ct.App. 1990)) (Emphasis added). See also Todd v. State, ___ S.W.2d ___ (Tex.App. 1997) (1997 Tex.App. LEXIS 5980); Aguilar v. State, 947 S.W.2d 257, 259 (Tex.Crim.App 1997)). Consequently, the State's failure to appear to defend the suspension, regardless of the reason, cannot defeat the effect of collateral estoppel in the subsequent criminal action.

A test refusal hearing is designed to be a contested evidentiary matter during which important issues of probable cause and sobriety are addressed. A decision, adverse to the State, must be allowed to collaterally estop the State from

using a tainted BA refusal against a defendant in a criminal prosection.

IV. CONCLUSION

Based on the foregoing arguments and citation of authority, the Petitioner, Robert L. Bacote, respectfully requests this Supreme Court to grant his Petition for Writ of Certiorari.

Respectfully submitted:

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STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY

STATE OF SOUTH CAROLINA	)	
	)	
vs.	)	94-GS-1221
	)	ORDER
	)	SUPPRESSING
	)	EVIDENCE
Robert Lee Bacote	)	
	)	

THIS MATTER CAME BEFORE THE COURT on October 18, 1995, upon the motion of the defendant, Robert Lee Bacote, requesting this Court suppress evidence of the Defendant's refusal to submit to a chemical breath test in connection with his arrest for Driving Under the Influence of Alcohol.

Having considered the arguments of counsel for the State and the defendant and the exhibits and testimony proffered, this Court rules as follows:

I. Having found no controlling appellate precedent to the contrary, the prior Circuit

Court order of the Honorable Walter J. Bristow, Jr., is binding upon this Court. Judge Bristow's order states that administrative decisions regarding the defendant's refusal to submit to a chemical breath test following an arrest for driving under the influence charges are binding upon the Circuit Court; AND

II. The Administrative Officer's decision to rescind the drivers license suspension based upon the failure of the arresting officer to appear a the hearing binds this Court and collaterally estops the State from relitigating or admitting into evidence the Defendant's refusal to submit to a chemical breath test; AND FURTHER

III. The decision of this Court to suppress evidence associated with the defendant's refusal of a chemical breath test may be directly appealed by the State under the authority of State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) and S.C. Code Ann. § 14-3-330 (1976).

THEREFORE, IT IS ORDERED that any and all evidence associated with the defendant's refusal of a chemical breath test is hereby inadmissible in the prosecution's case in chief.

IT IS SO ORDERED.

B. Hicks Harwell, Jr.
Circuit Court Judge

November 2, 19958
Moncks Corner, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State . . . . . Appellant,

v.

Robert Lee Bacote . . . . . .Respondent.

Appeal From Berkeley County
B. Hicks Harwell, Jr., Circuit Court Judge
Unpublished Opinion No. 97-UP-105
Submitted December 6, 1996 - Filed February 6, 1997

REVERSED

Assistant Solicitor Brent Alan Gray, of Moncks Corner, for appellant.

Stephen P. Groves and Stephen L. Brown, both of Young, Clement, Rivers & Tisdale, of Charleston; Reese I. Joye, Jr., and John L.

Drennan, both of Joye Law Firm, of North Charleston, for respondent.

PER CURIAM: Robert L. Bacote was arrested and charged with driving under the influence. The State appeals the order of the trial judge suppressing the evidence Bacote refused to submit to the breathalyzer test. We reverse.[1]

Facts

Bacote was arrested for driving under the influence of alcohol on June 26, 1994. Upon being taken into custody by police, Bacote refused to take a breathalyzer test. Because of his refusal to take the breath test, Bacote's driver's license was automatically suspended for ninety days pursuant to South Carolina's implied consent statute. S.C. Code Ann. § 56-5-2950(d) (Supp. 1996). Bacote requested an administrative hearing before the South Carolina Department of Public Safety, pursuant to S.C. Code Ann. § 56-5-2950(e) (1991), on the issue of whether he properly refused to submit to the

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[1]We decide this case without oral argument pursuant to Rule 215, SCACR.

breathalyzer test. The arresting officer failed to appear at the administrative hearing, and therefore, the hearing officer rescinded the suspension of Bacote's driver's license.

At trial, the State sought to admit testimony that Bacote refused to take the breathalyzer. Bacote objected on the grounds of collateral estoppel, arguing the State was bound by the previous decision of the administrative hearing officer. The trial judge agreed and issued an order stating:

> I. Having found no controlling appellate precedent to the contrary, the prior court order of the Honorable Walter J. Bristow, Jr. is binding upon this Court. Judge Bristow's order states that administrative decisions regarding a Defendant's refusal to submit to a chemical breath test following an arrest for driving under the influence charges are binding upon the Circuit Court; AND
>
> II. The Administrative Officer's decision to rescind the drivers license suspension based upon the failure of the arresting officer to appear at the hearing binds this court and collaterally estops the State from relitigating or admitting into evidence the Defendant's refusal to submit to a chemical breath test .

Discussion

The State argues the trial judge erred in holding that the decision of the administrative hearing officer binds the circuit court and collaterally estops the State from relitigating or admitting into evidence the Defendant's refusal to submit to a chemical breath test. We agree.

Under this state's implied consent statute, S.C. Code Ann. § 56-5-2950(d) (Supp. 1 996), a person arrested for driving under the influence who refuses to take a breathalyzer test will automatically have his or her license suspended for ninety days. Under subsection (e) of the statute, the Department of Public Safety, at the request of the defendant, must grant a hearing limited to the issues of whether the defendant was placed under arrest, whether the person had been informed that he did not have to take the test but that his privilege to drive would be suspended or denied if he refused to submit to the test, and whether he refused to submit to the test upon request of the officer. S.C. Code Ann. § 56-5-2950(e) (1991). If a hearing is requested, the ninety-day suspension does not begin until the date of the order sustaining the suspension. S.C. Code Ann. § 56-5-2950(d) (Supp. 1996).

In Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 459 S.E.2d 851 (Ct.App. 1995), this Court addressed the issue of whether an administrative decision of the Employment

Security Commission finding an employee was discharged for cause was binding in the employee's subsequent wrongful termination suit. In holding that collateral estoppel did not apply to ESC findings, the court first looked to the purpose underlying South Carolina's Employment Security Law. Id. at 85, 459 S.E.2d at 854. The court found that the legislature intended to keep procedural hurdles to a minimum in hearings before the ESC to enable unemployed claimants to obtain prompt decisions regarding ESC benefits. Id. at 86, 459 S.E.2d at 854. Because of this policy, the narrow issue the ESC decides is simply whether the claimant's discharge was with or without cause in order to determine whether the claimant should receive unemployment benefits. Id. at 86, 459 S.E.2d at 854-855. The court stated:

> Employers are not likely to fully litigate all issues before the ESC because the matter in controversy is comparatively small. Further, claimants are generally likely to be unrepresented by counsel at these hearings. If collateral estoppel applied to ESC decisions, ESC hearings would essentially become forums for employers and employees to engage in lengthy civil litigation over claims relating to an employee's discharge. This, we feel, would frustrate the intent underlying the employment security law.

Id. at 86, 459 S.E.2d at 855.

Applying the reasoning in Shelton we find that collateral estoppel should not apply to administrative hearings pursuant to S.C. Code Ann. § 56-5-2950(e) (1991). The purpose of providing an administrative hearing before the Department of Public Safety is to afford the driver some measure of procedural due process before suspending his or her driver's license. A hearing is necessary in this instance because the driver's license suspension occurs whether or not the person is ultimately found guilty of driving under the influence, and the suspension occurs before the person can obtain a trial on the merits of the charge. The hearing is limited to the narrow issues of whether the person was placed under arrest, whether the person had been informed he did not have to take the breath test, but that if he didn't his license would be suspended, and whether he in fact refused to submit to the test. Moreover, suspensions and revocations of driver's licenses by the Department are civil in nature and constitute no part of the punishment fixed by the court. Parker v. South Carolina State Highway Department, 224 S.C. 263, 271, 78 S.E.2d 382, 385 (1953).

We hold the purpose of the administrative hearing is limited to the appropriateness of the ninety-day suspension,

and is not intended to be a pre-trial evidentiary hearing.[2] Thus, the trial judge erred in holding the State was collaterally estopped from "relitigating" the issue of whether Bacote refused to take the breathalyzer test.

The State also argues the trial judge erred in holding that the prior order of Circuit Court Judge Walter Bristow was binding authority. However, because we reverse on the above ground, we need not address that issue.

Accordingly, the decision of the trial judge is

REVERSED.

CONNOR, HEARN, and STILWELL, JJ., concur.

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[2]See also McDaniel v. South Carolina Dep't of Pub. Saf., Op. No. 2607 (Davis Adv. Sh. No. 34 at 27) (S.C. Ct. App. Filed Dec. 23, 1996) (holding Dep't of Public Safety was not estopped from permanently revoking McDaniel's license for a fifth driving under the influence charge, even though he pled guilty only to fourth offense DUI. The court stated, "No representations made by the solicitor or the judge who accepted McDaniel's plea can serve as the basis for estopping the Department from revoking McDaniel's license because the solicitor and judge were involved only with the criminal case against McDaniel." Id. at 32.

THE SOUTH CAROLINA COURT OF APPEALS

The State . . . . . Appellant,

v.

Robert L. Bacote . . . . . Respondent.

ORDER DENYING PETITION
FOR REHEARING [*EN BANC*]

PER CURIAM: After careful consideration of the Petition for Rehearing [With Suggestion for Rehearing *En Banc*, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, is therefore, ordered that the Petition for Rehearing *En Banc* be denied.

[SIGNATURE LINES AND SIGNATURES OMITTED]
March 19, 1997
Columbia, South Carolina

THE SOUTH CAROLINA COURT OF APPEALS

The State . . . . . Appellant,

v.

Robert L. Bacote . . . . . Respondent.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied

[SIGNATURE LINES AND SIGNATURES OMITTED]

Columbia, South Carolina

March 19, 1997.

THE SUPREME COURT OF SOUTH CAROLINA

State of South Carolina, ... Respondent,

v.

Robert Lee Bacote, ... Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Bacote, Op. No. 97-UP-105 (S.C.Ct.App. filed February 6, 1997). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(h), SCACR.

[SIGNATURE LINE AND SIGNATURE OMITTED]
Columbia, South Carolina
December 5, 1997

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Robert Lee Bacote, ... Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Berkeley County
Hicks B. Harwell, Jr., Judge

Opinion No. 24794
Heard April 21, 1998 - Filed June 1, 1998

AFFIRMED

Stephen P. Groves, Sr., and Stephen L. Brown, both of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston; and Reese I. Joye and John L. Drennan, both of Joye Law Firm, L.L.P., of North Charleston, for petitioner.

Assistant Solicitor Brent A. Gray, of Moncks Corner, for respondent.

MOORE, A.J.: Petitioner sought a writ of certiorari to review the Court of Appeals' decision in State v. Bacote, Op. No. 97-UP-105 (S.C. Ct. App. Filed February 6, 1997). We affirm.

FACTS

After petitioner was arrested for driving under the influence (DUI) on June 26, 1994, he refused to take the breathalyzer test. He requested an administrative hearing from the South Carolina Department of Public Safety (SCDPS) to determine whether his license should be automatically suspended under the implied consent statute, S.C. Code Ann. § 56-5-2950 (Supp. 1996). Because the arresting officer did not appear at the administrative hearing, the hearing officer rescinded petitioner's automatic suspension.

Prior to petitioner's DUI trial, petitioner moved to suppress evidence regarding his refusal to take the breathalyzer test. The trial judge ruled collateral estoppel applied and held evidence petitioner refused the breathalyzer should be suppressed based upon the administrative hearing and subsequent dismissal of the automatic suspension. The State immediately appealed. The Court of Appeals reversed.

ISSUE

Did the Court of Appeals err in holding the trial judge erroneously suppressed petitioner's refusal to take the breathalyzer?

DISCUSSION

Under § 56-5-2950, a defendant may request a hearing to determine whether the defendant was placed under arrest, was informed that he could refuse the test whereupon his driving privileges would be suspended, and actually refused to take the test. If a hearing is requested the ninety-day suspension does not begin until after the hearing and the suspension is sustained.

The Court of Appeals relied upon its decision in Shelton v. Oscar Mayer Foods Corp. 319 S.C. 81, 459 S.E.2d 851 (Ct. App. 1995), and held collateral estoppel did not

apply to administrative hearings held pursuant § 56-5-2950. In Shelton, the issue was whether an administrative finding of the Employment Security Commission (ESC) was binding in the employee's subsequent wrongful termination suit. Based upon the limited nature of the ESC's hearing, the Court of Appeals held the ESC's findings were not binding. We reviewed the Court of Appeals' decision in Shelton and affirmed. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997). We agreed the nature of the ESC's hearing was limited and the ESC's findings should not be used as collateral estoppel in a subsequent civil action. In Shelton, we held if an issue decided at the ESC hearing could be used against an employer in a subsequent action, the hearing would become a full-blown trial on the issue of termination defeating the purpose which is to quickly provide an unemployed person some income.

We have previously adopted the general rule of collateral estoppel as set forth in the Restatement (Second) of Judgments § 27 (1982) in South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores. Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). Section 27 states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim." See also Palm v. General Painting Co. Inc., 302 S.C. 372, 396 S.E.2d 361 (1990) (citations omitted) ("Under the doctrine of

collateral estoppel, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues 'actually and necessarily litigated in the first suit.'").

In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation. 50 C.J.S. Judgments § 797 (1997). Thus, here, the license revocation hearing would not preclude the introduction of evidence regarding petitioner's refusal to take the breathalyzer because the issue was never actually litigated in the administrative proceeding. See State v. Lewry, 550 A.2d 64 (Me. 1988) (order entered by default in license suspension proceeding has no collateral effect in prosecution for DUI since the order was not the result of actual litigation on the issue on the merits); State v. Purvis, 739 S.W.2d 589 (Mo.App. 1987) (to be barred by collateral estoppel an issue must have been actually litigated as distinguished from a judgment rendered upon some preliminary or technical point, or by default and without trial).

Even had the issue actually been litigated, we hold collateral estoppel does not apply to issues decided at administrative hearings held pursuant to § 56-5-2950. The doctrine of collateral estoppel is indented to reduce litigation and conserve the resources of the court and litigants and it is

based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided. Since it is grounded upon concepts of fairness, it should not be rigidly or mechanically applied. In re Juan C., 89 N.Y.2d 659, 679 N.E.2d 1061, 657 N.Y.S.2d 581 (1997). See also 50 C.J.S. Judgments § 779 (1997). Thus, even if all the requirements of issue preclusion are met, when unfairness or injustice results or public policy requires it, the doctrine's application may be precluded. Id.

Section 28 of the Restatement (Second) of Judgments (1982), which we also adopted in South Carolina Prop. & Cas. Ins. Guar. Ass'n. v. Wal-Mart Stores, supra, provides, in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them . . .

> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

In State v. Williams, 76 Ohio St.3d 290, 667 N.E.2d 932 (1996), the Ohio Supreme Court held that pursuant to § 28(3) and (5) of the Restatement, an administrative license revocation proceeding does not preclude litigation of the same issue in a criminal prosecution. The court pointed out the limited nature of the administrative proceeding and its informality and also relied upon the adverse impact that collateral estoppel would have in the criminal proceedings if it were allowed (i.e. the State would be forced to treat the administrative hearing as an initial and essential part of the criminal trial).

Other jurisdictions have similarly held the state does

not have a full and fair opportunity to litigate issues during a license revocation proceeding, and it would be unfair to preclude the state from litigating such issues during a subsequent criminal trial. See People v. Moore, 138 Ill.2d 162, 561 N.E.2d 648 (1990); People v. Lalka, 113 Misc.2d 474, 449 N.Y.S.2d 579 (1982). We agree with the reasoning applied in these cases. The summary nature of the typical license revocation hearing makes determinations from such a hearing inappropriate for the application of collateral estoppel. Moore, supra.

Moreover, if every license revocation hearing carries with it potential collateral estoppel impact on a subsequent criminal action, the State may feel compelled to intervene in every administrative action to effectively protect its interests in some future criminal proceeding. The net effect would be to slow down what should be a summary administrative proceeding designed to handle license revocation matters quickly. Accordingly, the Court of Appeals' decision is

AFFIRMED.

FINNEY, C.J.., TOAL, WALLER and BURNETT,JJ., concur.

The Supreme Court of South Carolina

September 10, 1998

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Re: The State v. Robert Lee Bacote
Case No. 94-GS-08-1221

Dear Counsel:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

[Signature Lines Omitted]

September 10, 1998."

The remittitur in this matter is today being forwarded to the Clerk of Court for Berkeley County.

Very truly yours,

Acting Deputy Clerk
Brenda F. Shealey

Supreme Court, U.S.
FILED
APR 9 1999
CLERK

(2)

Nº. 98-1434

In The
Supreme Court of The United States
October Term 1998

ROBERT LEE BACOTE,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

On Writ Of Certiorari
To The Supreme Court of
South Carolina

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 pp

COUNTERQUESTION PRESENTED

DOES AN ADMINISTRATIVE RULING REVERSING THE AUTOMATIC SUSPENSION OF A DRIVER'S LICENSE FOR REFUSAL TO SUBMIT A BREATH SAMPLE COLLATERALLY ESTOP THE PROSECUTION FROM USING EVIDENCE OF THE REFUSAL IN A SUBSEQUENT CRIMINAL PROSECUTION FOR DRIVING UNDER THE INFLUENCE?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, State of South Carolina, prays that the Petition to review the judgment of the Supreme Court of South Carolina in the above-styled case be denied.

CITATION TO OPINION BELOW

The Respondent accepts the Petitioner's version cited in the Petition for Writ of Certiorari.

JURISDICTION

Opinion Number 24794 of the Supreme Court of South Carolina was filed on June 1, 1998. On September 10, 1998, the Supreme Court of South Carolina denied Petitioner's request for rehearing and said order is reproduced in Petitioner's appendix pp. 14. This Court's jurisdiction is invoked pursuant to §28 U. S. C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's version cited in the Petition for Writ of Certiorari.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

On June 26, 1994, Robert L. Bacote (Petitioner) was operating a motor vehicle on a roadway in Hanahan, South Carolina. Sergeant Tracy Roberts of the Hanahan Police Department observed Petitioner cross the center line twice. Officer Roberts stopped the Petitioner. As the Petitioner exited his vehicle, the officer noticed Petitioner was unsteady and holding the side of the car. The officer also noticed an odor of alcohol about the Petitioner. Following the administration of three field sobriety tests, Sergeant Roberts arrested Petitioner and charged him with Driving Under the Influence, Third Offense. The Petitioner was subsequently offered a breath test by Officer Michael R. Kirkley. After being advised of his options under the implied consent statute, Petitioner refused a breath test.

The Petitioner was indicted for Driving Under the Influence, more than first offense, on September 7, 1994.

An administrative hearing was scheduled by the South Carolina Department of Public Safety on December 12, 1994 to address the Petitioner's challenge to the automatic suspension of his driver's license resulting from his refusal to submit a breath sample. The arresting officer failed to appear at the administrative hearing and, therefore, the hearing officer rescinded the automatic suspension of the Petitioner's driver's license.

Petitioner's case was called for trial on October 18, 1995 before the Honorable B. Hicks Harwell. The trial court heard the Petitioner's motion to suppress the refusal of the breath test in a pre-trial hearing. Over the State's objection, the trial court granted the Petitioner's motion based upon the administrative officer's decision. The State appealed that decision.

The South Carolina Court of Appeals reversed the trial court's decision in an opinion issued on February 6, 1997. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the Court of Appeals on February 20, 1997. The Petition was denied on March 19, 1997.

The Petitioner then filed his Petition for Writ of Certiorari with the Supreme Court of South Carolina on April 15, 1997. The Petition was granted on December 5, 1997. Oral arguments were presented to the Supreme Court of South Carolina on April 21, 1998. On June 1, 1998, the Supreme Court of South Carolina affirmed the decision of the South Carolina Court of Appeals and, on September 10, 1998, denied the Petitioner a rehearing.

REASONS FOR DENYING THE WRIT

THE PROSECUTION IS NOT COLLATERALLY ESTOPPED FROM INTRODUCING EVIDENCE OF THE REFUSAL TO SUBMIT A BREATH SAMPLE IN A CRIMINAL PROSECUTION FOR DRIVING UNDER THE INFLUENCE DESPITE A PRIOR ADMINISTRATIVE RULING REVERSING THE AUTOMATIC SUSPENSION OF A DRIVER'S LICENSE BECAUSE OF THAT REFUSAL.

In deciding the instant case, the Supreme Court of South Carolina reaffirmed its position finding that collateral estoppel may only apply when parties have had the opportunity to fully litigate an issue. State v. Bacote, 331 S.C. 328, 503 S.E.2d 161 (1998). No hearing was ever held to determine the validity of Petitioner's refusal to submit to a breath analysis test. Id., 503 S.E.2d at 162. The administrative order rescinding the Petitioner's driver's license was a default order issued without benefit of a hearing. Id. The Bacote opinion gave the Supreme Court of South Carolina an opportunity to review the state's adoption of Section 27 of the Restatement (Second) of Judgments (1982)[1] as cited in South Carolina Property and Casualty

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[1]Restatement (Second) of Judgments (1982) Section 27 provides: "When an issue of fact or law is actually litigated

Insurance Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). According to the Supreme Court of South Carolina, collateral estoppel can only bind parties "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment." Id., 403 S.E.2d at 627. Under South Carolina law, the Petitioner's refusal to take the breath test should be admitted in his criminal trial because the State has had no previous opportunity to litigate this issue.

Even if an actual hearing had been held in the Petitioner's case, the Supreme Court of South Carolina correctly held the purpose of such a hearing is significantly different from a pre-trial evidentiary hearing. Therefore, such a hearing should never prevent the State from litigating an evidence issue at trial. Bacote, 503 S.E.2d at 163. A ruling from an administrative officer who does not even consider the introduction of criminal trial evidence cannot collaterally estop the State from litigating the admissibility of the refusal in a subsequent criminal trial for the offense of driving under the influence.

Before considering the Petitioner's claim of collateral estoppel, a reviewing court must first consider the purpose of the South Carolina implied consent statute. With regard to

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and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

suspension of a driver's license after a breath test refusal, the statute provides:

> Upon suspending the license or permit to drive or nonresident operating privilege of any person, or upon determining that the issuance of a license or permit must be denied to the person, as hereinbefore in this section directed, the department shall notify immediately the person in writing and, upon his request, shall afford him an opportunity for a hearing in accordance with the State Administrative Procedures Act, except that the scope of the hearing for the purposes of this section must be limited to the issues of whether the person was placed under arrest, whether the person had been informed that he did not have to take the test but that his privilege to drive would be suspended or denied if he refused to submit to the test, and whether he refused to submit to the test upon request of the officer. The department shall order that the suspension or determination that there should be a denial of issuance either be rescinded or sustained.

S.C. Code Ann. § 56-5-2950(e) (West Group Supp. 1997).

The suspension of a driver's license is a tremendous inconvenience to a driver. The purpose of an administrative hearing about a breath test refusal is to allow the driver a prompt decision as to the implied consent suspension. The promptness of the hearing is critical inasmuch as a driver's license is suspended regardless of whether or not the driver has committed any criminal offense. The issue addressed at the administrative hearing is, therefore, statutorily narrow.

Recognizing the similarities between the instant case and an earlier South Carolina case decided in 1995 and affirmed in 1997, the Supreme Court of South Carolina relied upon Shelton v. Oscar Mayer Foods Corporation, 319 S.C. 81, 459 S.E.2d 851 (Ct.App. 1995), aff'd, 325 S.C. 248, 481 S.E.2d 706 (1997), in reversing the trial judge's application of collateral estoppel. In Shelton, the Court considered whether or not collateral estoppel applies to decisions of the South Carolina Employment Securities Commission (ESC). The analysis in Shelton provides an example to be followed in this case.

The purpose served by an ESC hearing was the first factor considered by the Court. Id., 481 S.E.2d at 708. After considering the statute outlining the public policy of the ESC, the Court concluded the purpose of the administrative hearing was to enable unemployed claimants to obtain prompt decisions regarding benefits from the ESC. Id. According to the Court, this important narrow purpose would be lost if estoppel was permitted as a valid claim to employees or the

ESC. The Court determined collateral estoppel "would result in ESC hearings becoming a forum for lengthy civil litigation of claims relating to an employee's discharge." Id.

The narrow purpose of the implied consent statue is not unlike the ESC statute considered in Shelton. As the Court found with regard to ESC hearings, parties at an implied consent hearing do not and should not appear in anticipation of fully litigating the issues of probable cause for an arrest and other evidence matters related to the sobriety of the driver. The administrative litigation is supposed to be confined to the appropriateness of the ninety-day suspension. If the results of an implied consent hearing are binding on the circuit court, the purpose of the administrative hearing will shift from the appropriateness of a ninety-day suspension period to a more critical pre-trial evidentiary hearing. This change in purpose will change the nature of the hearings. As discussed by the Supreme Court of South Carolina in its Bacote opinion, the State will need to be involved at the hearing stage to protect its interest in future criminal proceedings. The effect will circumvent the very purpose of the quick administrative proceedings. Bacote, 503 S.E.2d at 164.

The Supreme Court of South Carolina is not the first state appellate court to consider this issue. As cited in the Bacote opinion, the Supreme Court of Ohio held that Section 28 of the Restatement (Second) of Judgments (1982) is applicable under these circumstances. State v. Williams, 76

Ohio St. 3d 290, 667 N.E.2d 932 (1996). Following the rules outlined in sections 28(3) and (5) of the Restatement,[2] the Williams court concluded that an administrative hearing designed to determine the appropriateness of a driver's license suspension does not estop the prosecution from litigating the issue at the driver's criminal trial. Id., at 76 Ohio St. 3d at 296. Appellate courts in Illinois and New York have, likewise, declined to apply collateral estoppel in similar

---

[2]Restatement (Second) of Judgments (1982) Section 28 (3) and (5), in pertinent part, provide: "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties in not precluded in the following circumstances: . . . (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. . . .(5) There is a clear and convincing need for a determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication of the initial action. Restatement (Second) of Judgments Section 28 (3), (5) (1982).

situations. See People v. Moore, 138 Ill.2d 162, 561 N.E.2d 648 (1990); People v. Lalka, 113 Misc.2d 474, 449 N.Y.S.2d 579 (1982).

Appellate jurisdiction of the Supreme Court of the United States is limited by its own rules.[3] Insomuch as the Supreme Court of South Carolina has correctly applied state law to Petitioner's circumstances, its decision does not involve a question of federal law and is not in conflict with another state court of last resort or a United States court of appeals, there is no compelling reason for this Supreme Court to grant review.

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[3] Sup. Ct. R. 10 (1997).

CONCLUSION

Based on the foregoing arguments and citation of authority, the Respondent, the State of South Carolina, respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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